



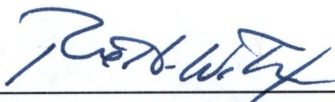
# City of NORFOLK

To the Honorable Council  
City of Norfolk, Virginia

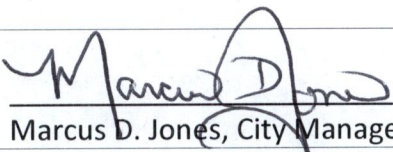
May 20, 2014

From: Steven J. Anderson, Director Department of  
Development

**Subject:** Encroachment Agreement  
for Outdoor Dining – 4314 Colley  
Avenue – Natalie, LLC

Reviewed:   
Ronald H. Williams Jr., Assistant City  
Manager

**Ward/Superward:** 2/6

Approved:   
Marcus D. Jones, City Manager

**Item Number:** R-4

I. **Recommendation:** Adopt Ordinance

II. **Applicant:** Natalie, LLC  
4125 Portsmouth Boulevard  
Portsmouth, VA 23701

III. **Description**

This agenda item is an Encroachment Agreement to permit Natalie, LLC and restaurant operator Eva's to encroach 642.6 square feet into the city right of way with an enclosed dining area. There will be 11 tables, with 4 seats at each tables. A portion of the building facade, lighting, a bicycle rack and landscaping will also encroach the right-of-way. The purpose of this encroachment is to allow outdoor seating for customers at 4314 Colley Avenue.

IV. **Analysis**

An encroachment is an object or structure that infringes into the City of Norfolk's right-of-way or property. Norfolk City Code, Section 42-10, requires all encroachments into City rights-of-way and properties to be approved by City Council.

This Encroachment Agreement will permit Natalie, LLC and their restaurant operator to encroach approximately 642.6 square feet into City of Norfolk right-of-way. The term of the encroachment is no longer than five (5) years, commencing upon the effective date of the ordinance and expiring five (5) years thereafter.

Hours of Operation	Outdoor Seating Capacity
Mon-Tues Closed Wed-Thurs 4:00 PM – 12:00 AM Fri-Sat: 4:00 PM – 2:00 AM Sunday: 11:00 AM – 12:00 AM	44

**V. Financial Impact**

The applicant will pay the City an annual rent in the amount of \$3,855.60, paid in monthly installments of \$321.30.

**VI. Environmental**

There are no known environmental issues associated with this encroachment.

**VII. Community Outreach/Notification**

Public notification for this agenda item was conducted through the City of Norfolk's agenda notification process.

**VIII. Board/Commission Action**

The outdoor dining request was approved by the Planning Commission on March 27, 2014.

**IX. Coordination/Outreach**

This letter has been coordinated with Department of Development – Division of Real Estate and the City Attorney's Office.

Supporting Material from the City Attorney's Office:

- Ordinance
- Encroachment Agreement

Form and Correctness Approved: 

By   
Office of the City Attorney

Contents Approved:

By   
DEPT.

NORFOLK, VIRGINIA

## ORDINANCE No.

AN ORDINANCE GRANTING NATALIE, L.L.C., PERMISSION TO ENCROACH INTO THE RIGHTS OF WAY OF COLLEY AVENUE AND 44<sup>TH</sup> STREET, AT 4314 COLLEY AVENUE, AND APPROVING THE TERMS AND CONDITIONS OF THE ENCROACHMENT AGREEMENT.

- - -

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That the terms and provisions of the Encroachment Agreement between the City of Norfolk and Natalie, L.L.C., a copy of which is attached hereto as Exhibit A, are hereby approved, and in accordance therewith, permission is hereby granted to Natalie, L.L.C., to encroach into the rights of way of Colley Avenue, and 44<sup>th</sup> Street, at 4314 Colley Avenue with outdoor dining, a metal fence, lighting, a bicycle rack, a door, building façade, roof, and landscaping, for the purpose of providing facilities for outdoor dining. Owner shall be permitted to lease the areas to be encroached upon to a restaurant operator approved by the City. Owner, however, shall continue to be responsible for its obligations with respect to the encroachments defined herein, regardless of who is restaurant operator.

Section 2:- That the terms and conditions of the Encroachment Agreement are hereby approved and the City Manager, and other proper officers of the City, is hereby authorized to execute the Encroachment Agreement, to make amendments consistent with the terms and conditions and do all things necessary for its implementation.

Section 3:- That this ordinance shall be in effect from and after its adoption.

## **ENCROACHMENT AGREEMENT**

This **ENCROACHMENT AGREEMENT** (hereinafter "Agreement") is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_ 2014, by and between the **CITY OF NORFOLK**, a municipal corporation of the Commonwealth of Virginia (hereinafter, "City"), and **NATALIE, L.L.C.**, (hereinafter, "Owner").

### **WITNESSETH:**

1. **ENCROACHMENT AREA.** City hereby grants permission to Owner to encroach into the rights of way of Colley Avenue and 44<sup>th</sup> Street, with outdoor dining, a metal fence, lighting, a bicycle rack, a door, building façade, roof and landscaping, having a total area of approximately 642.6 square feet, more or less, as shown on Exhibit A attached hereto ("Encroachment Area"), for the purpose of outdoor dining and no other purpose.

2. **USE.** Owner shall be permitted to occupy the Encroachment Area for outdoor dining in conjunction with the operation of a restaurant located at 4314 Colley Avenue, Norfolk, Virginia. Said restaurant shall be known as Eva's, operated by Benjamin Bublick.

3. **TERM; TERMINATION.** The term of the permission to encroach granted hereby shall be no longer than five (5) years and shall commence on June 1, 2014, or upon the effective date of any authorizing ordinance, whichever shall last occur, and shall terminate on May 30, 2019. However, it is expressly understood that the permission granted hereby is expressly subject to the right of revocation by the Norfolk City Council, and that in the event of such revocation, Natalie, L.L.C., or its successors or assigns, if requested by City, shall remove the encroaching structures and shall cease using the Encroachment Area.

4. **COMPENSATION.** As compensation for the privilege of encroaching into the right of way, Owner shall pay City rent in the amount of \$3,855.60 annually based on a rental rate of \$6.00 per square foot of the Encroachment Area, and such rent to be paid in monthly installments of \$321.30 on or before the first day of each month. The rent shall be paid

by check payable to the "Norfolk City Treasurer" and sent to the Department of Development, 500 E. Main Street, Suite 1500, Norfolk, Virginia 23510, and Attn: Rhonda Scott, Real Estate Coordinator.

5. **LATE FEES.** For any late payments received 5 days after the first of each month, Owner shall pay a late fee of five percent (5%) of the amount not paid when due.

6. **UTILITIES.** City shall not be responsible for utilities of any type used within the Encroachment Area. Owner shall pay all utility meter and utility services charges for all utilities, including but not limited to gas, electricity, water, telephone, sewer, and any other necessary to serve the Encroachment Area.

7. **REPAIRS.** Owner shall keep and maintain the Encroachment Area in good and complete state of repair and condition. Owner shall make all repairs and replacements of every kind to the sidewalks and paved areas of the Encroachment Area in order to preserve and maintain the condition of the Encroachment Area. All such repairs and maintenance shall be performed in a good and workmanlike manner, be at least equal in quality and usefulness to the original components, and not diminish the overall value of the Encroachment Area.

8. **REQUIREMENTS OF PUBLIC LAWS.** Owner shall suffer no waste or injury to the Encroachment Area and shall comply with all federal, state and municipal laws, ordinances and regulations applicable to the structure, use and occupancy of the Encroachment Area. In addition, Owner shall effect the correction, prevention and abatement of nuisances, violations or other grievances in, upon or connected with the Encroachment Area.

9. **CITY'S RIGHT TO ENTER AND CURE.** City shall retain the right to enter upon the Encroachment Area at any time for the purpose of inspecting the Encroachment Area, ascertaining compliance with this Agreement, and making any repairs which City deems necessary as a consequence of any failure of Owner to meet their obligations under this

Agreement. The cost of any such repairs shall be deemed additional compensation payable to the City on demand. Any entry upon the Encroachment Area or cure and repair shall be accomplished by City at reasonable times and in the exercise of reasonable discretion by the City. The making of any repairs by City shall not constitute a waiver by City of any right or remedy upon Owner default in making repairs.

10. **NOTICE.** Any notice shall be in writing and shall be delivered by hand or sent by United States Registered or Certified Mail, postage prepaid, addressed as follows:

City: Department of Development  
500 E. Main Street, Suite 1500  
Norfolk, Virginia 23510  
Attn: Rhonda Scott, Real Estate Coordinator

Owner: Natalie, L.L.C.  
4125 Portsmouth Blvd.  
Portsmouth, VA 23701

And

Robyn Thomas Architecture  
Attn: Robyn Thomas  
913 W. 21<sup>st</sup> Street, C  
Norfolk, VA 23517

With copies to: City Attorney  
900 City Hall Building  
810 Union Street  
Norfolk, Virginia 23510

Either party hereto may change its address to which said notice shall be delivered or mailed by giving notice of such change as provided above. Notice shall be deemed given when delivered (if delivered by hand) or when postmarked (if sent properly by mail).

11. **ENVIRONMENTAL MATTERS.** Owner agrees that it will not introduce onto the Encroachment Area any toxic, hazardous or dangerous materials unless such material is stored, safeguarded, or used in accordance with applicable laws and regulations. Owner will not allow any air, water or noise pollution to occur in the Encroachment Area.

Owner hereby agrees to use and occupy the Encroachment Area in a safe and reasonable manner and in accordance with applicable law.

City in turn agrees that Owner shall not be responsible or assume liability for environmental conditions existing on or about the Encroachment Area prior to Owner's occupancy thereof under this Agreement.

12. **DESTRUCTION.** If the encroaching structures or any part thereof shall be damaged or destroyed by fire, lightning, vandalism, or by any other casualty or cause, the permission granted hereby shall be automatically terminated unless the parties agree, in writing, to continue to permit the encroachments granted by this Agreement.

13. **NON-LIABILITY OF CITY.** City shall not be liable for any damage or injury which may be sustained by Owner or any other person as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, gas, sewer, waste or spoil pipes, roof, drains, leaders, gutters, valleys, downspouts or the like, or of the electrical, ventilation, air conditioning, gas, power, conveyor, refrigeration, sprinkler, heating or other systems, elevators or hoisting equipment, if any, upon the Encroachment Area, or by reason of the elements; or resulting from acts, conduct or omissions on the part of Owner, or their agents, employees, guests, licensees, invitees, assignees or successors, or on the part of any other person or entity.

14. **REMOVAL OF SNOW.** Owner agrees to remove or cause to be removed, as the need for the same arises, snow and ice from the Encroachment Area.

15. **ALTERATIONS.** Owner covenants and agrees that it will not make any improvements, changes, installations, renovations, additions or alterations in and about the Encroachment Area without the prior written consent of the City, or subsequently approved modification to Encroachment Area. If Owner installs or makes any improvements, additions, installations, renovations, or changes on or to the Encroachment Area with the approval of City,



Owner hereby agrees to remove, if requested by City, any improvements, additions, installations, and renovations, changes on or to the Encroachment Area upon termination of this Agreement. In the event Owner fails to remove and is requested to do so by City, then City may remove the improvements, additions, installations, renovations, or changes and Owner shall pay for the cost of such removal.

16. **ASSIGNMENT AND SUBLETTING.** City and Owner agree that the permission to encroach granted hereby may not be assigned by Owner without written approval from Norfolk's City Manager. City acknowledges that the Encroachment Area is to be used for outdoor dining and the outdoor dining may be operated by an agent or lessee of Natalie, L.L.C.

17. **SURRENDER BY OWNER.** Owner will surrender possession of the Encroachment Area to City and remove all goods and chattels and other personal property therefrom upon termination of the permission granted hereby. Owner shall return the Encroachment Area to the City in as good order and condition as it was at the beginning of Owner's use of the Encroachment Area, reasonable wear and tear excepted. If Owner has been requested to remove and fails to remove all items from the Encroachment Area upon termination hereof, City is authorized to remove and dispose of any such personal property and Owner shall be liable to City for the cost of any removal and disposal.

18. **INSURANCE.** Owner shall maintain in full force and effect Commercial General Liability (CGL) insurance with a combined single limit policy of bodily injury, death and property damage insurance for Owner of one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) aggregate insuring against all liability arising out of the use, occupancy, or maintenance of the Encroachment Area and appurtenant areas. CGL insurance shall be written on an approved ISO form for coverage in the Commonwealth of Virginia, and shall cover liability arising from premises, operations, independent contractors, products-



completed operations, personal injury and liability assumed under insured contract. The City its officers, employees, agents and representatives shall be named as additional named insured on such policy. Coverage shall be evidenced by a Certificate of Insurance provided to the City within thirty (30) days after adoption of this Agreement. All insurance policies and certificates shall provide for thirty (30) days advance notice in writing to Owner if the insurance is cancelled or modified. Owner shall inform the City Attorney and Department of Development within 15 days of receiving such notice or cancellation, and immediately obtain coverage compliant with this agreement.

Owner shall maintain applicable statutory Workers' Compensation Insurance, and Employer's Liability Insurance with a limit of at least \$500,000 per accident/disease, and policy limit of \$500,000 covering any Owner employees whose work for Owner occurs within the premises which are subject to this agreement.

19. **FIXTURES.** City covenants and agrees that no part of the improvements constructed, erected or placed by Owner in the Encroachment Area shall be or become, or be considered as being, affixed to or a part of the right of way, and any and all provisions and principles of law to the contrary notwithstanding, it being the specific intention of City and Owner to covenant and agree that all improvements of every kind and nature constructed, erected or placed by Owner in the Encroachment Area shall be and remain the property of Natalie, L.L.C..

20. **ENVIRONMENTAL COMPLIANCE.**

(a) For purposes of this section:

(i) "Hazardous Substances" include any pollutants, dangerous substances, toxic substances, hazardous wastes, hazardous materials or hazardous substances as defined in or pursuant to the Resource and Conservation Recovery Act (42 U.S.C. SS6901 et

seq.) (IIRCRAII), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. SS9601 et seq.) (CERCLAII) or any other federal, state, or local environmental law, ordinance, rule or regulation.

(ii) "Release" means releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, disposing or dumping.

(iii) "Notice" means any summons, citation, directive, order, claim, litigation, investigation, proceeding, judgment, letter or other communication, written or oral, actual or threatened, from any authority of the Commonwealth of Virginia, the United States Environmental Protection Agency (USEPAII) or other federal, state or local agency or authority, or any other entity or any individual, concerning any intentional act or omission resulting or which may result in the Release of Hazardous Substances into the waters or onto the lands of the Commonwealth of Virginia, or into waters outside the jurisdiction of the Commonwealth of Virginia or into the "environment," as such terms are defined in CERCLA. "Notice" shall include the imposition of any lien on any real property, personal property or revenues of the Owner, including but not limited to the Owner's interest in the Leased Premises or any of Owner's property located thereon, or any violation of federal, state or local environmental laws, ordinances, rules, regulations, governmental actions, orders or permits, or any knowledge, after due inquiry and investigation, or any facts which could give rise to any of the above.

(b) To the extent that Owner may be permitted under applicable law to use the Encroachment Area for the generating, manufacture, refining, transporting, treatment, storage, handling, disposal, transfer or processing of Hazardous Substances, solid wastes or other dangerous or toxic substances, Owner shall insure that said use shall be conducted at all times strictly in accordance with applicable statutes, ordinances and governmental rules and

regulations. Owner shall not cause or permit, as a result of any intentional or unintentional act or omission, a Release of Hazardous Substances in the Encroachment Area. If any such intentional or unintentional act or omission causes a Release of Hazardous Substance in the Encroachment Area, Owner shall promptly clean up and remediate such Release in accordance with the applicable federal, state and local regulations and to the reasonable satisfaction of City.

(c) Owner shall comply with all applicable federal, state and local environmental laws, ordinances, rules and regulations, and shall obtain and comply with any and all permits required thereunder or any successor or new environmental laws. Upon the receipt of any Notice, Owner shall notify City promptly in writing, detailing all relevant facts and circumstances relating to the Notice.

(d) The requirements of this Section 20 shall apply to any successor in interest to Owner, whether due to merger, sale of assets or other business combination or change of control.

(e) Owner hereby agrees to defend (with counsel satisfactory to City) and indemnify and hold City harmless from and against any and all claims, losses, liabilities, damages and expenses (including, without limitation, reasonable cleanup costs and attorney's fees arising under this indemnity) which may arise directly or indirectly from any use or Release of Hazardous Substances in the Encroachment Area and losses and claims against City resulting from Owner's failure to comply strictly with the provisions of this Section 20. The provisions of this Section 20 shall survive the termination of this permission granted by this Agreement.

21. **LIENS OR ENCUMBRANCES.** If because of any act or omission of Owner, any mechanic's lien or other lien, charge or order for the payment of money shall be filed against any portion of the Encroachment Area, Owner shall, at its own cost and expense, cause the same to be discharged of record or bonded within ninety (90) days after written notice

from the City to Owner of the filing thereof, and Owner shall have the right to contest the validity of such lien if it so chooses.

22. **APPLICABLE LAW.** The permission granted by this Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia. Any suit or legal proceeding relating to permission granted hereby shall be brought only in the state or federal courts located in the Eastern District of Virginia.

23. **WAIVER OF TRIAL BY JURY.** To the extent permitted by law, City and Owner mutually waive their rights to trial by jury in any action, proceeding or counterclaim brought by either party against the other with respect to any dispute or claim arising out of the permission to encroach granted to Owner by this agreement.

24. **OTHER REQUIREMENTS.**

(a) Owner shall comply with the City of Norfolk's Downtown Outdoor Dining Policy.

(b) Owner shall comply with all requirements of the City of Norfolk Department of Public Health with respect to the use of the Encroachment Area.

(c) The use of the Encroachment Area shall be subject to the jurisdiction and review of the City of Norfolk's Design Review Committee.

(d) Owner's use of the Encroachment Area shall not interfere with any water meters or sewer cleanouts.

(e) A trash can compatible in design and style with the table and chairs will be provided for the outdoor dining, and trash shall be removed daily.

(f) Tables and chairs will be arranged according to plan approved by Norfolk's Design Review Committee, or subsequent approval if applicable.

25. **COMPLIANCE WITH FEDERAL IMMIGRATION LAW.** At all times during which any term of this Agreement is in effect, Owner does not and shall not knowingly employ any unauthorized alien. For purposes of this section, an "unauthorized alien" shall mean any alien who is neither lawfully admitted for permanent residence in the United States nor authorized to be employed either by Title 8, Section 1324a of the United States Code or the U. S. Attorney General.

26. **DOMESTIC OR FOREIGN BUSINESS COMPLIANCE.** The Owner, by executing this Agreement, certifies that it is authorized to transact business in Virginia as a domestic or foreign business entity as required by the State Corporation Commission, or as otherwise required by law. The Owner further certifies that it will maintain such status during the term of this Agreement. This Agreement is voidable at the option of the City if, at the time the Owner entered into this Agreement, it was not authorized to transact business in Virginia as a domestic or foreign business entity; or, having qualified to enter into this Agreement fails to maintain such status during its term.

**IN WITNESS WHEREOF,** Parties have executed or have caused this Encroachment Agreement to be executed by their duly authorized officers and their corporate seals to be hereunto affixed and attested, all as of the day and year first above written.

**CITY OF NORFOLK**

By: \_\_\_\_\_  
City Manager

**ATTEST:**

\_\_\_\_\_  
City Clerk                      Date

**APPROVED AS TO CONTENTS:**

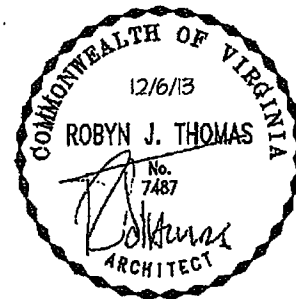
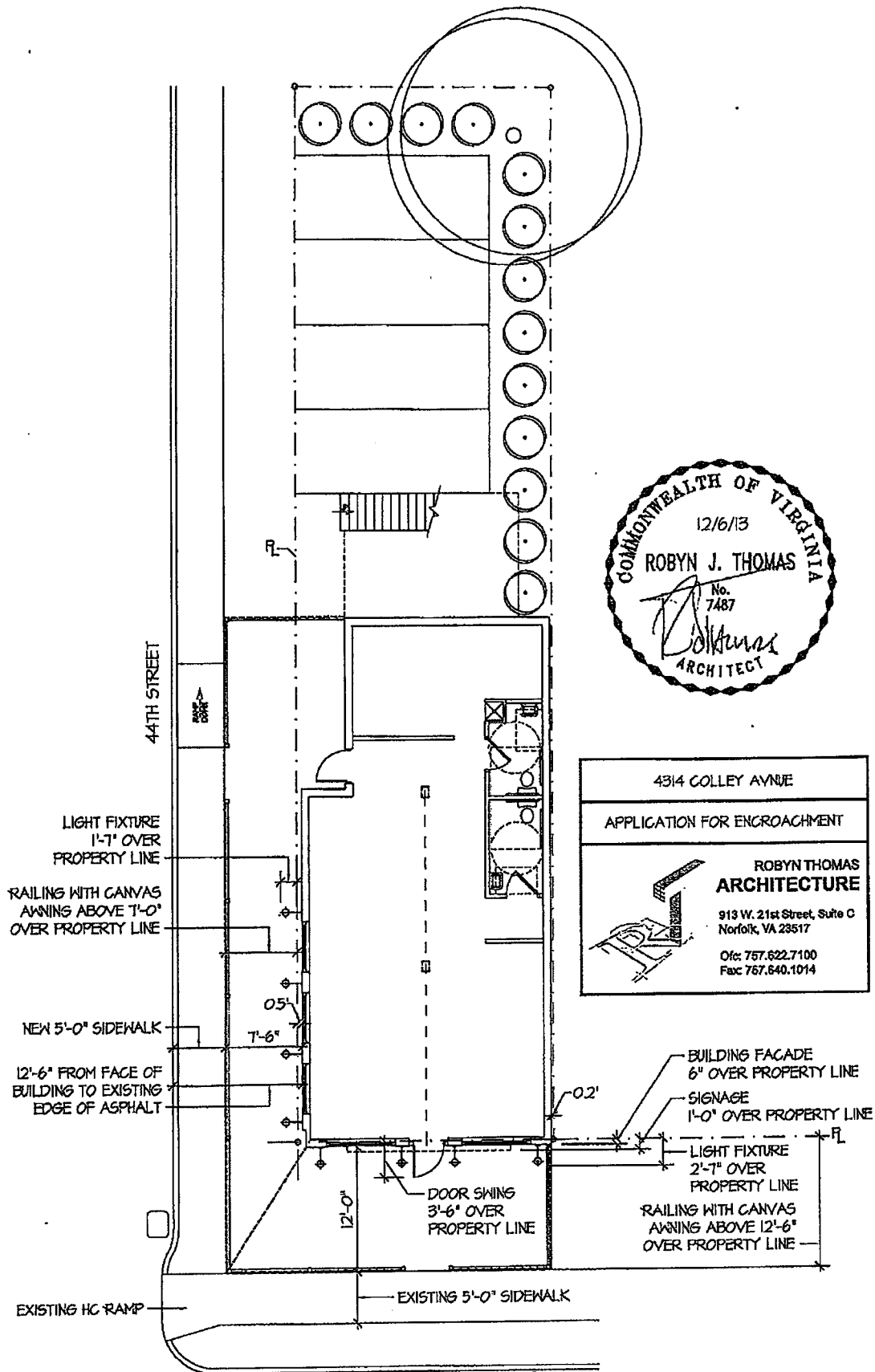
\_\_\_\_\_  
Department of Development      Date


**FORM & CORRECTNESS APPROVED:**

\_\_\_\_\_  
Deputy City Attorney      Date

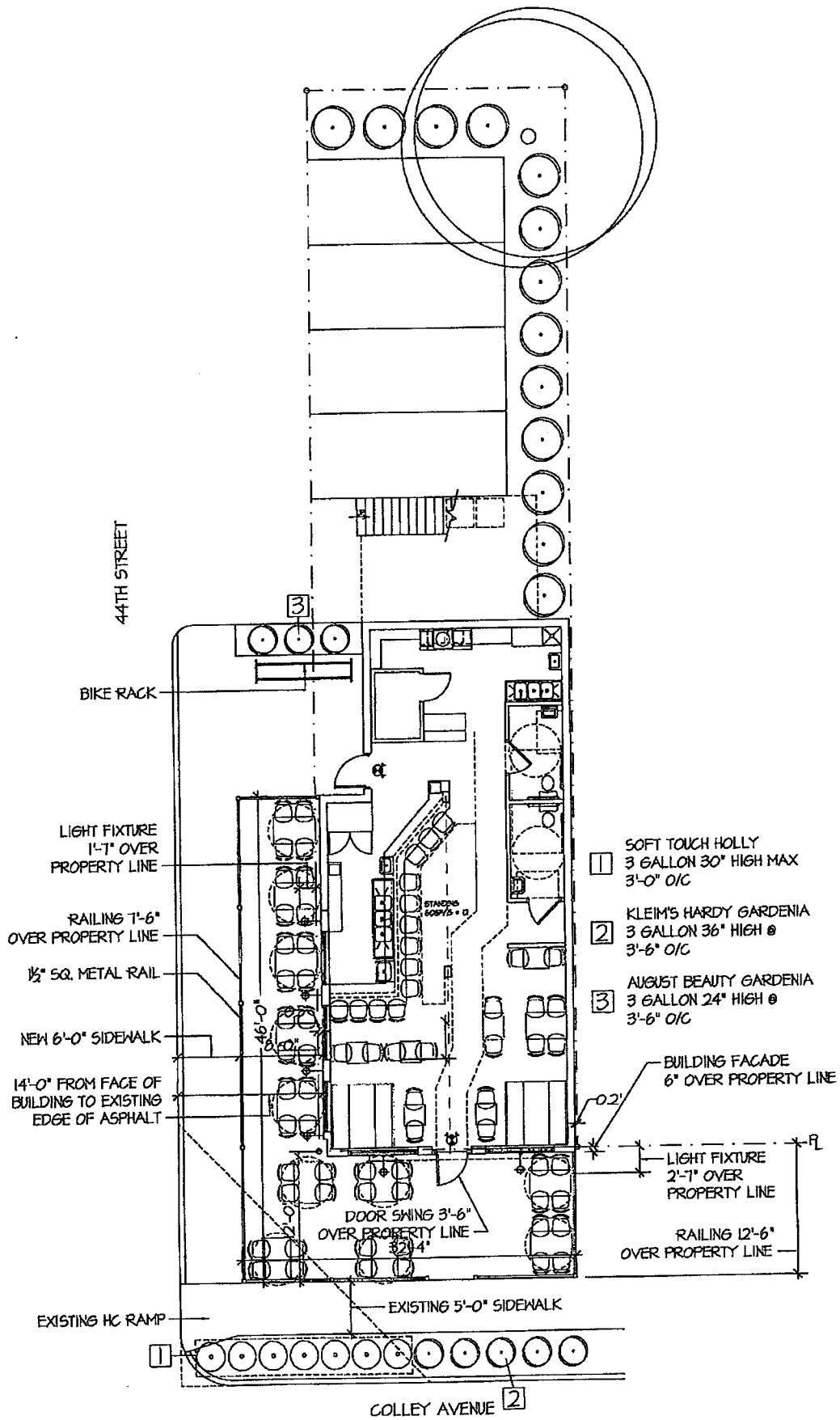
**NATALIE, L.L.C.**

By: \_\_\_\_\_  
Title: \_\_\_\_\_



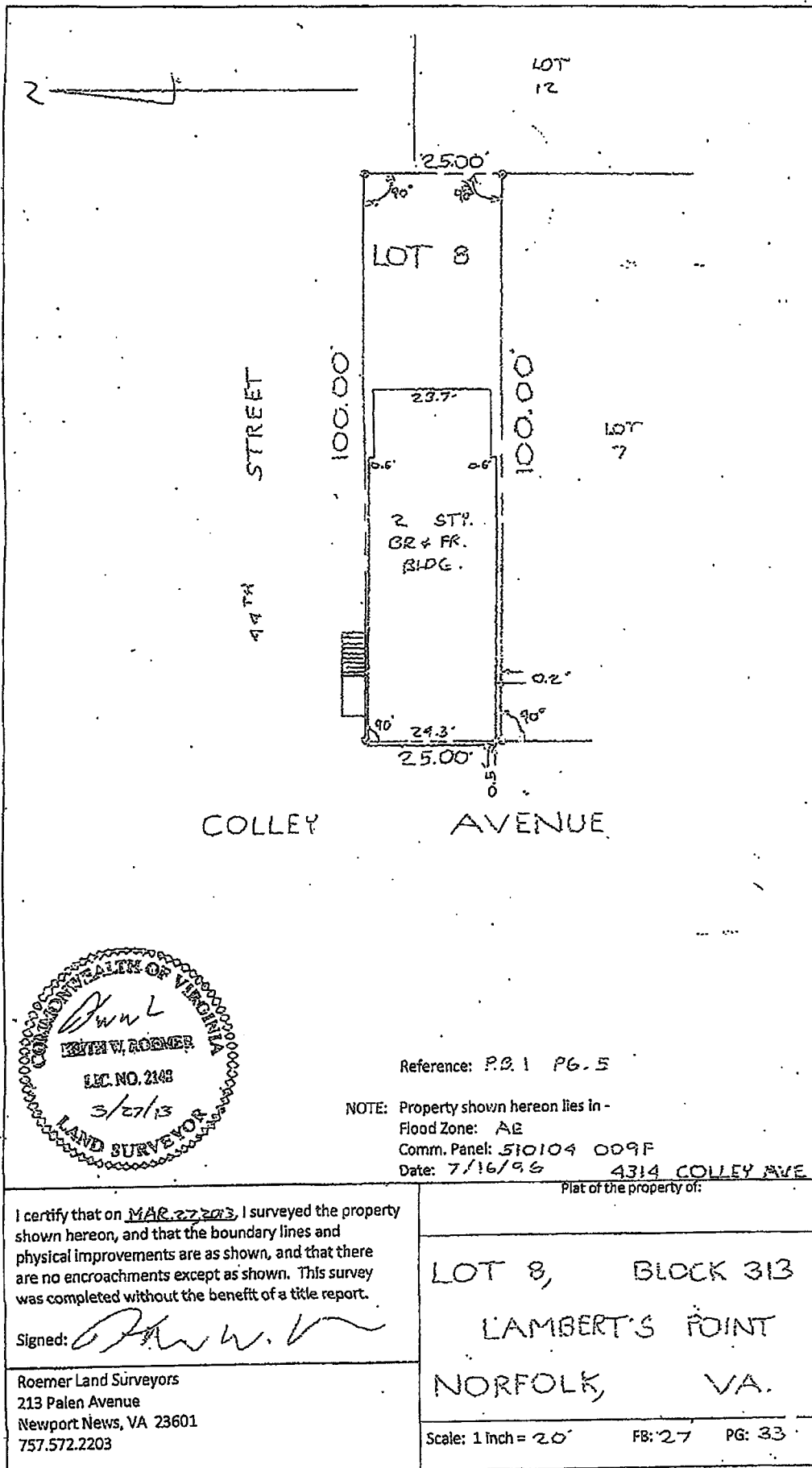
4314 COLLEY AVENUE	
APPLICATION FOR ENCROACHMENT	
	<b>ROBYN THOMAS ARCHITECTURE</b> 913 W. 21st Street, Suite C Norfolk, VA 23517 Ofc: 757.622.7100 Fax: 757.640.1014

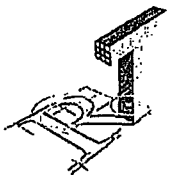


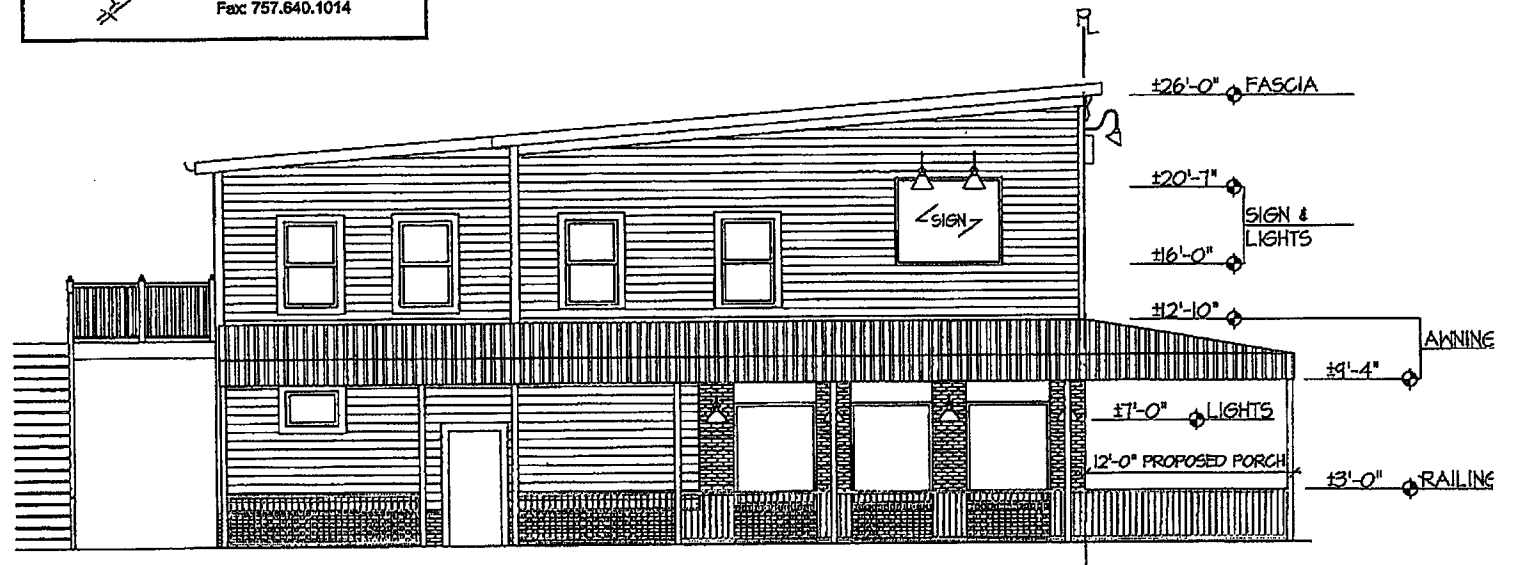


4314 COLLEY AVENUE: SITE PLAN

3/32" = 1'-0"



4314 COLLEY AVENUE	
APPLICATION FOR ENCROACHMENT	
	<b>ROBYN THOMAS ARCHITECTURE</b>
	913 W. 21st Street, Suite C Norfolk, VA 23517
	Ofc: 757.622.7100 Fax: 757.640.1014



4314 COLLEY AVENUE: 44TH STREET ELEVATION

1/8" = 1'-0"

44TH STREET

BIKE RACK

7'-6" x 46'-0"  
= 345 SF

LIGHT FIXTURE  
1'-7" OVER  
PROPERTY LINE

RAILING 7'-6"  
OVER PROPERTY LINE

1/2" SQ. METAL RAIL

NEW 6'-0" SIDEWALK

14'-0" FROM FACE OF  
BUILDING TO EXISTING  
EDGE OF ASPHALT

12'-0" x 24'-10"

= 297.6 SF

EXISTING HC RAMP

EXISTING 5'-0" SIDEWALK

COLLEY AVENUE

4314 COLLEY AVENUE: SITE PLAN

5/32" = 1'-0"

1 SOFT TOUCH HOLLY  
3 GALLON 30" HIGH MAX  
3'-0" O/C

2 KLEIM'S HARDY GARDENIA  
3 GALLON 36" HIGH @  
3'-6" O/C

3 AUGUST BEAUTY GARDENIA  
3 GALLON 24" HIGH @  
3'-6" O/C

BUILDING FACADE  
6" OVER PROPERTY LINE

LIGHT FIXTURE  
2'-7" OVER  
PROPERTY LINE

RAILING 12'-6"  
OVER PROPERTY LINE

TOTAL  
DWING  
ENCROACHMENT  
642.6 SF